

June 7, 2023

**VIA E-MAIL**

Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: Securities Exchange Act Rel. 34-97053 (SR-NYSEArca-2023-20)

Dear Secretary:

NYSE Arca, Inc. filed the attached Amendment No. 1 to the above-referenced filing on June 7, 2023.

Sincerely,



Encl. (Amendment No. 1 to SR-NYSEArca-2023-20)

**Martha Redding**  
**Corporate Secretary**

New York Stock Exchange  
11 Wall Street  
New York, NY 10005  
Tel: +1 212.656. 2938 | Fax: +1 212.656.8101  
**ice.com**

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 49

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 20

Amendment No. (req. for Amendments \*) 1

Filing by NYSE Arca, Inc.

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposal to adopt new Rule 5.3-E(p)

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* John Last Name \* Carey

Title \* Senior Director, NYSE Group Inc.

E-mail \* John.Carey@ice.com

Telephone \* (212) 656-5640 Fax

### Signature

Pursuant to the requirements of the Securities Exchange of 1934, NYSE Arca, Inc. has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 06/07/2023

(Title \*)

By Martha Redding

Corporate Secretary

(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Martha Redding

Digitally signed by Martha Redding  
Date: 2023.06.07 14:48:59 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information \***

Add Remove View

SEC Sub Am. 1 NYSE Arca clawback

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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Ex. 1 SEC Sub Am. 1 NYSE Arca clawback

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

Add Remove View

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

Add Remove View

Ex. 4 SEC Sub Am. 1 NYSE Arca clawback

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

Ex. 5 SEC Sub Am. 1 NYSE Arca clawback

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) proposes to adopt new Rule 5.3-E(p) to require issuers to develop and implement a policy providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers.

This Amendment No. 1 replaces SR-NYSEARCA-2023-20 as originally filed and supersedes such filing in its entirety.<sup>3</sup>

The text of the proposed rule change is set forth in Exhibit 5 attached hereto.

- (b) The Exchange does not believe that the proposed rule change would have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange's governing documents. Therefore, the Exchange's internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

John Carey  
Senior Director  
NYSE Group, Inc.  
(212) 656-5640

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See footnote 4 infra.

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

This Amendment No. 1 replaces SR-NYSEARCA-2023-20 as originally filed and supersedes such filing in its entirety.<sup>4</sup>

On October 26, 2022, the Securities and Exchange Commission (“SEC”) adopted a new rule and rule amendments<sup>5</sup> to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),<sup>6</sup> which added Section 10D to the Act.<sup>7</sup> In accordance with Section 10D of the Act, the final rules direct the national securities exchanges and associations that list securities to establish listing standards that require each issuer to develop and implement a policy providing for the recovery, in the event of a required accounting restatement, of incentive-based compensation received by current or former executive officers where that compensation is based on the erroneously reported financial information. The listing standards must also require the disclosure of the policy. Additionally, the final rules require a listed issuer to file the policy as an exhibit to its annual report and to include other disclosures in the event a recovery analysis is triggered under the policy.

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<sup>4</sup> See Securities Exchange Act Release No. 97053 (March 7, 2023), 88 FR 15495 (March 13, 2023) (SR-NYSEARCA-2023-20). See also Securities Exchange Act Release No. 97362 (April 24, 2023), 88 FR 26370 (April 28, 2023) (extending the Commission’s period to take action to June 11, 2023). The original filing included provisions establishing cure periods to be applied in the event of a listed issuer’s failure to adopt a recovery policy within the required time period, but did not establish cure period provisions for other incidents of noncompliance with Rule 5.3-E(p). Amendment No. 1 revises these cure period provisions so that they are now applicable to all incidents of noncompliance with Rule 5.3-E(p) and not just delayed adoption of recovery policies. Amendment No. 1 also differs from the original filing in that it includes a discussion of a provision added to Rule 5.3-E in the original filing that makes it clear, consistent with the language of proposed Rule 5.3-E(p), that every listed issuer would be subject to proposed Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule. In addition, Amendment No. 1 revises the text of proposed Rule 5.3-E(p) to provide that Rule 5.3-E(p) would be effective as of October 2, 2023.

<sup>5</sup> See Release Nos. 33–11126; 34–96159; IC– 34732; File No. S7–12–15; 87 FR 73076 (November 28, 2022) (“Rule 10D-1 Adopting Release”).

<sup>6</sup> 2 Pub. L. No. 111-203, 124 Stat. 1900 (2010).

<sup>7</sup> 15 U.S.C. 78j–4.

Specifically, the rule amendments the SEC adopted pursuant to Section 10D of the Act<sup>8</sup> require specific disclosure of the listed issuer's policy on recovery of incentive-based compensation and information about actions taken pursuant to such recovery policy. Rule 10D-1 requires listing exchanges to require that listed issuers file all disclosures with respect to their recovery policies in accordance with the requirements of the Federal securities laws, including the disclosures required by the applicable SEC filings. The rule amendments require listing exchanges to require each listed issuer to: (i) file their written recovery policies as exhibits to their annual reports; (ii) indicate by check boxes on their annual reports whether the financial statements included in the filings reflect correction of an error to previously issued financial statements and whether any of those error corrections are restatements that required a recovery analysis; and (iii) disclose any actions they have taken pursuant to such recovery policies.

Rule 10D-1 requires that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirements under the securities laws. In the Rule 10D-1 Adopting Release, the SEC states that the issuer and its directors and officers must comply with this requirement in a manner that is consistent with the exercise of their fiduciary duty to safeguard the assets of the issuer (including the time value of any potentially recoverable compensation). The issuer's obligation to recover erroneously awarded incentive based compensation reasonably promptly will be assessed on a holistic basis with respect to each such accounting restatement prepared by the issuer. In evaluating whether an issuer is recovering erroneously awarded incentive-based compensation reasonably promptly, the Exchange will consider whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount.

Rule 10D-1 became effective on January 27, 2023. Exchanges are required to file proposed listing standards no later than February 27, 2023, and the listing standards must be effective no later than November 28, 2023. Issuers subject to such listing standards will be required to adopt a recovery policy no later than 60 days following the date on which the applicable listing standards become effective.

### **Proposed NYSE Arca Rule**

NYSE Arca proposes to comply with Rule 10D-1 by adopting proposed Rule 5.3-E(p). Proposed Rule 5.3-E(p) is designed to conform closely to the applicable language of Rule 10D-1. Proposed Rule 5.3-E(p) would prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion thereof.

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<sup>8</sup> See footnote 4 *supra*.

## Implementation

Proposed Rule 5.3-E(p) would take effect on October 2, 2023 (the “Effective Date”). The Exchange believes that it is consistent with Section 10D of the Act to delay effectiveness of Rule 5.3-E(p) until this date because it believes that doing so is consistent with the goal of implementing the proposed rule promptly while also being consistent with the expectations of listed issuers that the proposed rules would take effect a year after the adoption of SEC Rule 10D-1, based on the issuers’ understanding of a statement made by the SEC staff in the Rule 10D-1 Adopting Release.<sup>9</sup>

Proposed Rule 5.3-E(p)(B) would establish the timeframe within which listed companies must comply with proposed Rule 5.3-E(p). Specifically:

- Each listed issuer must adopt the recovery policy required by proposed Rule 5.3-E(p) (“Recovery Policy”) no later than 60 days from the Effective Date.
- Each listed issuer must comply with its Recovery Policy for all incentive-based compensation Received (as such term is defined in proposed Rule 5.3-E(p)(E) as set forth below) by executive officers on or after the Effective Date that results from attainment of a financial reporting measure based on or derived from financial information for any fiscal period ending on or after the Effective Date.
- Each listed issuer must provide the required disclosures in the applicable SEC filings required on or after the Effective Date.

## Requirements of Proposed Rule

The requirements of proposed Rule 5.3-E(p) would be as follows:

- The issuer must adopt and comply with a written Recovery Policy providing that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any

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<sup>9</sup> Specifically, the Rule 10D-1 Adopting Release included the following statement ( 87 FR at 73111):

While we acknowledge commenter concerns about the need for adequate time to prepare for the application of the listing standards and the development of appropriate recovery policies, including in some cases the renegotiation of certain contracts, we believe the final rules provide ample time for such preparations. In that regard, we note that issuers will have more than a year from the date the final rules are published in the Federal Register to prepare and adopt compliant recovery policies. We believe the prescriptive nature of Rule 10D-1 provides issuers with sufficient notice to begin such preparations concurrently with listing standards being finalized.

financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

- The issuer's Recovery Policy must apply to all incentive-based compensation received by a person:
  - After beginning service as an executive officer;
  - Who served as an executive officer at any time during the performance period for that incentive-based compensation;
  - While the issuer has a class of securities listed on a national securities exchange or a national securities association; and
  - During the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p). In addition to these last three completed fiscal years, the Recovery Policy must apply to any transition period (that results from a change in the issuer's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the issuer's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year. An issuer's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.
- For purposes of determining the relevant recovery period, the date that an issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of Rule 5.3-E(p) is the earlier to occur of:
  - The date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p); or
  - The date a court, regulator, or other legally authorized body directs the issuer to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p).

- The amount of incentive-based compensation that must be subject to the issuer's Recovery Policy ("erroneously awarded compensation") is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:
  - The amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received; and
  - The issuer must maintain documentation of the determination of that reasonable estimate and provide such documentation to the Exchange.
  
- The issuer must recover erroneously awarded compensation in compliance with its Recovery Policy except to the extent that the conditions in one of the three bullets set forth below are met, and the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable.
  - The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the issuer must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the Exchange.
  - Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, acceptable to the Exchange, that recovery would result in such a violation, and must provide such opinion to the Exchange.

- Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.
- The issuer is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.

### **Disclosure in SEC Filings**

The issuer must file all disclosures with respect to such Recovery Policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the applicable Commission filings.

### **General Exemptions**

The requirements of proposed Rule 5.3-E(p) would not apply to the listing of:

- A security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act<sup>10</sup> or that is exempt from the registration requirements of section 17A(b)(7)(A);<sup>11</sup>
- A standardized option, as defined in 17 CFR 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act;<sup>12</sup>
- Any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); (4) Any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940,<sup>13</sup> if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

### **Definitions under Proposed Rule 5.3-E(p)**

Unless the context otherwise requires, the following definitions apply for purposes of proposed Rule 5.3-E(p):

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<sup>10</sup> 15 U.S.C. 78q-1.

<sup>11</sup> 15 U.S.C. 78q-1(b)(7)(A).

<sup>12</sup> 15 U.S.C. 78q-1.

<sup>13</sup> 15 U.S.C. 80a-8.

*Executive Officer.* An executive officer is the issuer’s president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer’s parent(s) or subsidiaries are deemed executive officers of the issuer if they perform such policy making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant. Identification of an executive officer for purposes of Rule 5.3-E(p) would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b).

*Financial reporting measures.* Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer’s financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.

*Incentive-based compensation.* Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.

*Received.* Incentive-based compensation is deemed received in the issuer’s fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

## **Delisting**

The Exchange proposes to adopt new Rule 5.3-E(p)(F) (“Noncompliance with Rule 5.3-E(p) (Erroneously Awarded Compensation)” that sets forth procedures that would apply if an issuer failed to comply with Rule 5.3-E(p). The compliance process in proposed Rule 5.3-E(p)(F) is closely modeled on the compliance process for listed issuers delayed in submitting periodic reports to the SEC as set forth in Section 802.01E of the NYSE Listed Company Manual and Section 1007 of the NYSE American Company Guide.

In the event that the Exchange determines that a listed issuer is non-compliant with any of the provisions of Rule 5.3-E(p) (Erroneously Awarded Compensation) and such listed issuer does not regain compliance with such provision within any compliance period provided by the Exchange under the provisions described below, all the listed securities of such issuer will be immediately suspended and the Exchange will immediately

commence delisting procedures with respect to all such listed securities. A listed issuer will be subject to the procedures outlined in Rule 5-5E(a) with respect to such a delisting determination.

A listed issuer will be deemed to be below standards in the event of any failure by such listed issuer to comply with any requirement of Rule 5.3-E(p) (a “Clawback Requirement Delinquency”). The listed issuer would be required to notify the Exchange in writing within five days of any type of Clawback Requirement Delinquency. When the Exchange determines that a Clawback Requirement Delinquency has occurred, the Exchange will promptly send written notification (the “Clawback Requirement Delinquency Notification”) to a listed issuer of the procedures set forth below. Within five days of the date of receipt of a Clawback Requirement Delinquency Notification, the listed issuer will be required to (a) contact the Exchange to discuss the status of resolution of the Clawback Requirement Delinquency and (b) issue a press release disclosing the occurrence of the Clawback Requirement Delinquency, the reason for the Clawback Requirement Delinquency and, if known, the anticipated date the Clawback Requirement Delinquency will be cured. If the listed issuer has not issued the required press release within five days of the date of the Clawback Requirement Delinquency Notification, the Exchange will issue a press release stating that the issuer has incurred a Clawback Requirement Delinquency and providing a description thereof.

During the six-month period from the date of the Clawback Requirement Delinquency (the “Initial Clawback Requirement Delinquency Cure Period”), the Exchange will monitor the listed issuer and the status of resolution of the Clawback Requirement Delinquency, including through contact with the listed issuer, until the Clawback Requirement Delinquency is cured. If the listed issuer fails to cure the Clawback Requirement Delinquency within the Initial Clawback Requirement Delinquency Cure Period, the Exchange may, in its sole discretion, allow the listed issuer’s securities to be traded for up to an additional six-month period (the “Additional Clawback Requirement Delinquency Cure Period”) depending on the listed issuer’s specific circumstances and as described below. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Rule 5.5-E(a). Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a listed issuer any Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, as the case may be, at all, or (ii) at any time during the Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, to truncate the cure period and immediately commence suspension and delisting procedures if the listed issuer is subject to delisting pursuant to any other provision of the NYSE Arca rules, including if the Exchange believes, in the Exchange’s sole discretion, that continued listing and trading of a listed issuer’s securities on the Exchange is inadvisable or unwarranted. In determining whether an Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period is appropriate, or whether such period should be truncated, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during such period. The Exchange may also

commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period if the Exchange believes, in the Exchange's sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors.

In determining whether an Additional Clawback Requirement Delinquency Cure Period after the expiration of the Initial Clawback Requirement Delinquency Cure Period is appropriate, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during the Additional Clawback Requirement Delinquency Cure Period. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is appropriate and the listed issuer fails to cure its Clawback Requirement Delinquency by the end of that period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Rule 5.5-E(a). In no event will the Exchange continue to trade a listed issuer's securities if that listed issuer has failed to cure its Clawback Requirement Delinquency on the date that is twelve months after the date of sending of the Clawback Requirement Delinquency Notification.

#### **Clarification of Rule 5.3-E**

The Exchange proposes to amend the text of Rule 5.3-E to make it clear, consistent with the language of proposed Rule 5.3-E(p), that every listed issuer would be subject to proposed Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule.

#### **(b) Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>15</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that proposed new Rule 5.3-E(p) is consistent with the protection of investors and the public interest because it furthers the goal of ensuring the accuracy of the financial disclosure of listed issuers. Specifically, the Exchange believes the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which we expect will further discourage such behavior. The Exchange believes that these increased incentives may improve the overall quality and reliability of financial

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<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

reporting, which further benefits investors. The new proposed Rule 5.3-E(p) is also consistent with the requirements of Section 10D of the Act and Rule 10D-1 thereunder, as it would establish a listing standard that is consistent with the requirements of Rule 10D-1.

Proposed Rule 5.3-E(p) would take effect on October 2, 2023 (the “Effective Date”). The Exchange believes that it is consistent with Section 10D of the Act to delay effectiveness of Rule 5.3-E(p) until this date because it believes that doing so is consistent with the goal of implementing the proposed rule promptly while also being consistent with the expectations of listed issuers that the proposed rules would take effect a year after the adoption of SEC Rule 10D-1, based on the issuers’ understanding of a statement made by the SEC staff in the Rule 10D-1 Adopting Release.<sup>16</sup>

The Exchange proposes to adopt continued listing standards for proposed Rule 5.3-E(p) in proposed Rule 5.3-E(p)(F) that sets forth procedures that would apply if an issuer failed to comply with Rule 5.3-E(p). Proposed Rule 5.3-E(p)(F)(i) would provide compliance periods of up to 12 months for a listed issuer that is noncompliant with any aspect of Rule 5.3-E(p). The compliance process in proposed Rule 5.3-E(p)(F) is closely modeled on the compliance process for listed issuers delayed in submitting periodic reports to the SEC as set forth in Section 802.01E of the NYSE Listed Company Manual and Section 1007 of the NYSE American Company Guide. The Exchange believes that the compliance procedures set forth in proposed Rule 5.3-E(p)(F) are appropriately rigorous and are consistent with the public interest and the interests of investors.

The Exchange proposes to amend the text of Rule 5.3-E to make it clear, consistent with the language of proposed 5.3-E(p), that all listed issuers would be required to comply with the requirements of proposed 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule. The Exchange believes that this proposed amendment is consistent with the public interest and the interests of investors as it provides clarification by conforming the text of Rule 5.3-E to the requirements of proposed Rule 5.3-E(p).

4. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that Rule 10D-1 under the Act requires all listing exchanges to adopt rules with respect to the recovery of erroneously awarded compensation that are substantively identically to proposed Rule 5.3-E(p).

5. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

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<sup>16</sup> See note 9 infra.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The Exchange was required to adopt the proposed rule pursuant to Rule 10D-1 under the Act.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 4 – Amendments to Proposed Rule Text in Amendment No. 1

Exhibit 5 – Proposed Rule Text

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NYSEARCA-2023-20, Amendment No. 1)

[Date]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to Adopt New Rule 5.3-E(p)

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on June 7, 2023, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt new Rule 5.3-E(p) to require issuers to develop and implement a policy providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers. This Amendment No. 1 replaces SR-NYSEARCA-2023-20 as originally filed and supersedes such filing in its entirety.<sup>4</sup> The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See footnote 5 infra.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 replaces SR-NYSEARCA-2023-20 as originally filed and supersedes such filing in its entirety.<sup>5</sup>

On October 26, 2022, the Securities and Exchange Commission (“SEC”) adopted a new rule and rule amendments<sup>6</sup> to implement Section 954 of the Dodd-Frank Wall Street Reform and

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<sup>5</sup> See Securities Exchange Act Release No. 97053 (March 7, 2023), 88 FR 15495 (March 13, 2023) (SR-NYSEARCA-2023-20). See also Securities Exchange Act Release No. 97362 (April 24, 2023), 88 FR 26370 (April 28, 2023) (extending the Commission’s period to take action to June 11, 2023). The original filing included provisions establishing cure periods to be applied in the event of a listed issuer’s failure to adopt a recovery policy within the required time period, but did not establish cure period provisions for other incidents of noncompliance with Rule 5.3-E(p). Amendment No. 1 revises these cure period provisions so that they are now applicable to all incidents of noncompliance with Rule 5.3-E(p) and not just delayed adoption of recovery policies. Amendment No. 1 also differs from the original filing in that it includes a discussion of a provision added to Rule 5.3-E in the original filing that makes it clear, consistent with the language of proposed Rule 5.3-E(p), that every listed issuer would be subject to proposed Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule. In addition, Amendment No. 1 revises the text of proposed Rule 5.3-E(p) to provide that Rule 5.3-E(p) would be effective as of October 2, 2023.

<sup>6</sup> See Release Nos. 33–11126; 34–96159; IC– 34732; File No. S7–12–15; 87 FR 73076 (November 28, 2022) (“Rule 10D-1 Adopting Release”).

Consumer Protection Act of 2010 (“Dodd-Frank Act”),<sup>7</sup> which added Section 10D to the Act.<sup>8</sup>

In accordance with Section 10D of the Act, the final rules direct the national securities exchanges and associations that list securities to establish listing standards that require each issuer to develop and implement a policy providing for the recovery, in the event of a required accounting restatement, of incentive-based compensation received by current or former executive officers where that compensation is based on the erroneously reported financial information. The listing standards must also require the disclosure of the policy. Additionally, the final rules require a listed issuer to file the policy as an exhibit to its annual report and to include other disclosures in the event a recovery analysis is triggered under the policy.

Specifically, the rule amends the SEC adopted pursuant to Section 10D of the Act<sup>9</sup> require specific disclosure of the listed issuer’s policy on recovery of incentive-based compensation and information about actions taken pursuant to such recovery policy. Rule 10D-1 requires listing exchanges to require that listed issuers file all disclosures with respect to their recovery policies in accordance with the requirements of the Federal securities laws, including the disclosures required by the applicable SEC filings. The rule amends require listing exchanges to require each listed issuer to: (i) file their written recovery policies as exhibits to their annual reports; (ii) indicate by check boxes on their annual reports whether the financial statements included in the filings reflect correction of an error to previously issued financial statements and whether any of those error corrections are restatements that required a recovery analysis; and (iii) disclose any actions they have taken pursuant to such recovery policies.

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<sup>7</sup> 2 Pub. L. No. 111-203, 124 Stat. 1900 (2010).

<sup>8</sup> 15 U.S.C. 78j-4.

<sup>9</sup> See footnote 5 supra.

Rule 10D-1 requires that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirements under the securities laws. In the Rule 10D-1 Adopting Release, the SEC states that the issuer and its directors and officers must comply with this requirement in a manner that is consistent with the exercise of their fiduciary duty to safeguard the assets of the issuer (including the time value of any potentially recoverable compensation). The issuer's obligation to recover erroneously awarded incentive based compensation reasonably promptly will be assessed on a holistic basis with respect to each such accounting restatement prepared by the issuer. In evaluating whether an issuer is recovering erroneously awarded incentive-based compensation reasonably promptly, the Exchange will consider whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount.

Rule 10D-1 became effective on January 27, 2023. Exchanges are required to file proposed listing standards no later than February 27, 2023, and the listing standards must be effective no later than November 28, 2023. Issuers subject to such listing standards will be required to adopt a recovery policy no later than 60 days following the date on which the applicable listing standards become effective.

#### **Proposed NYSE Arca Rule**

NYSE Arca proposes to comply with Rule 10D-1 by adopting proposed Rule 5.3-E(p). Proposed Rule 5.3-E(p) is designed to conform closely to the applicable language of Rule 10D-1. Proposed Rule 5.3-E(p) would prohibit the initial or continued listing of any security of an issuer

that is not in compliance with the requirements of any portion thereof.

### **Implementation**

Proposed Rule 5.3-E(p) would take effect on October 2, 2023 (the “Effective Date”).

The Exchange believes that it is consistent with Section 10D of the Act to delay effectiveness of Rule 5.3-E(p) until this date because it believes that doing so is consistent with the goal of implementing the proposed rule promptly while also being consistent with the expectations of listed issuers that the proposed rules would take effect a year after the adoption of SEC Rule 10D-1, based on the issuers’ understanding of a statement made by the SEC staff in the Rule 10D-1 Adopting Release.<sup>10</sup>

Proposed Rule 5.3-E(p)(B) would establish the timeframe within which listed companies must comply with proposed Rule 5.3-E(p). Specifically:

- Each listed issuer must adopt the recovery policy required by proposed Rule 5.3-E(p) (“Recovery Policy”) no later than 60 days from the Effective Date.
- Each listed issuer must comply with its Recovery Policy for all incentive-based compensation Received (as such term is defined in proposed Rule 5.3-E(p)(E) as set forth below) by executive officers on or after the Effective Date that results

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<sup>10</sup> Specifically, the Rule 10D-1 Adopting Release included the following statement (87 FR at 73111):

While we acknowledge commenter concerns about the need for adequate time to prepare for the application of the listing standards and the development of appropriate recovery policies, including in some cases the renegotiation of certain contracts, we believe the final rules provide ample time for such preparations. In that regard, we note that issuers will have more than a year from the date the final rules are published in the Federal Register to prepare and adopt compliant recovery policies. We believe the prescriptive nature of Rule 10D-1 provides issuers with sufficient notice to begin such preparations concurrently with listing standards being finalized.

from attainment of a financial reporting measure based on or derived from financial information for any fiscal period ending on or after the Effective Date.

- Each listed issuer must provide the required disclosures in the applicable SEC filings required on or after the Effective Date.

### **Requirements of Proposed Rule**

The requirements of proposed Rule 5.3-E(p) would be as follows:

- The issuer must adopt and comply with a written Recovery Policy providing that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.
- The issuer's Recovery Policy must apply to all incentive-based compensation received by a person:
  - After beginning service as an executive officer;
  - Who served as an executive officer at any time during the performance period for that incentive-based compensation;
  - While the issuer has a class of securities listed on a national securities exchange or a national securities association; and

- During the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p). In addition to these last three completed fiscal years, the Recovery Policy must apply to any transition period (that results from a change in the issuer's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the issuer's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year. An issuer's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.
- For purposes of determining the relevant recovery period, the date that an issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of Rule 5.3-E(p) is the earlier to occur of:
  - The date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p); or
  - The date a court, regulator, or other legally authorized body directs the issuer to prepare an accounting restatement as described in paragraph (C)(1) of proposed Rule 5.3-E(p).

- The amount of incentive-based compensation that must be subject to the issuer's Recovery Policy ("erroneously awarded compensation") is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:
  - The amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received; and
  - The issuer must maintain documentation of the determination of that reasonable estimate and provide such documentation to the Exchange.
- The issuer must recover erroneously awarded compensation in compliance with its Recovery Policy except to the extent that the conditions in one of the three bullets set forth below are met, and the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable.

- The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the issuer must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the Exchange.
- Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, acceptable to the Exchange, that recovery would result in such a violation, and must provide such opinion to the Exchange.
- Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.
  - The issuer is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.

### **Disclosure in SEC Filings**

The issuer must file all disclosures with respect to such Recovery Policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the

applicable Commission filings.

### **General Exemptions**

The requirements of proposed Rule 5.3-E(p) would not apply to the listing of:

- A security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act<sup>11</sup> or that is exempt from the registration requirements of section 17A(b)(7)(A);<sup>12</sup>
- A standardized option, as defined in 17 CFR 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act;<sup>13</sup>
- Any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); (4) Any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940,<sup>14</sup> if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

### **Definitions under Proposed Rule 5.3-E(p)**

Unless the context otherwise requires, the following definitions apply for purposes of proposed Rule 5.3-E(p):

*Executive Officer.* An executive officer is the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any

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<sup>11</sup> 15 U.S.C. 78q-1.

<sup>12</sup> 15 U.S.C. 78q-1(b)(7)(A).

<sup>13</sup> 15 U.S.C. 78q-1.

<sup>14</sup> 15 U.S.C. 80a-8.

vice-president of the issuer in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parent(s) or subsidiaries are deemed executive officers of the issuer if they perform such policy making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant. Identification of an executive officer for purposes of Rule 5.3-E(p) would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b).

*Financial reporting measures.* Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.

*Incentive-based compensation.* Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.

*Received.* Incentive-based compensation is deemed received in the issuer's fiscal period during which the financial reporting measure specified in the incentive-based compensation

award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

### **Delisting**

The Exchange proposes to adopt new Rule 5.3-E(p)(F) (“Noncompliance with Rule 5.3-E(p) (Erroneously Awarded Compensation)”) that sets forth procedures that would apply if an issuer failed to comply with Rule 5.3-E(p). The compliance process in proposed Rule 5.3-E(p)(F) is closely modeled on the compliance process for listed issuers delayed in submitting periodic reports to the SEC as set forth in Section 802.01E of the NYSE Listed Company Manual and Section 1007 of the NYSE American Company Guide.

In the event that the Exchange determines that a listed issuer is non-compliant with any of the provisions of Rule 5.3-E(p) (Erroneously Awarded Compensation) and such listed issuer does not regain compliance with such provision within any compliance period provided by the Exchange under the provisions described below, all the listed securities of such issuer will be immediately suspended and the Exchange will immediately commence delisting procedures with respect to all such listed securities. A listed issuer will be subject to the procedures outlined in Rule 5-5E(a) with respect to such a delisting determination.

A listed issuer will be deemed to be below standards in the event of any failure by such listed issuer to comply with any requirement of Rule 5.3-E(p) (a “Clawback Requirement Delinquency”). The listed issuer would be required to notify the Exchange in writing within five days of any type of Clawback Requirement Delinquency.

When the Exchange determines that a Clawback Requirement Delinquency has occurred, the Exchange will promptly send written notification (the “Clawback Requirement Delinquency Notification”) to a listed issuer of the procedures set forth below. Within five days of the date of

receipt of a Clawback Requirement Delinquency Notification, the listed issuer will be required to (a) contact the Exchange to discuss the status of resolution of the Clawback Requirement Delinquency and (b) issue a press release disclosing the occurrence of the Clawback Requirement Delinquency, the reason for the Clawback Requirement Delinquency and, if known, the anticipated date the Clawback Requirement Delinquency will be cured. If the listed issuer has not issued the required press release within five days of the date of the Clawback Requirement Delinquency Notification, the Exchange will issue a press release stating that the issuer has incurred a Clawback Requirement Delinquency and providing a description thereof.

During the six-month period from the date of the Clawback Requirement Delinquency (the “Initial Clawback Requirement Delinquency Cure Period”), the Exchange will monitor the listed issuer and the status of resolution of the Clawback Requirement Delinquency, including through contact with the listed issuer, until the Clawback Requirement Delinquency is cured. If the listed issuer fails to cure the Clawback Requirement Delinquency within the Initial Clawback Requirement Delinquency Cure Period, the Exchange may, in its sole discretion, allow the listed issuer’s securities to be traded for up to an additional six-month period (the “Additional Clawback Requirement Delinquency Cure Period”) depending on the listed issuer’s specific circumstances and as described below. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Rule 5.5-E(a). Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a listed issuer any Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, as the case may be, at all, or (ii) at any time during the Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement

Delinquency Cure Period, to truncate the cure period and immediately commence suspension and delisting procedures if the listed issuer is subject to delisting pursuant to any other provision of the NYSE Arca rules, including if the Exchange believes, in the Exchange's sole discretion, that continued listing and trading of a listed issuer's securities on the Exchange is inadvisable or unwarranted. In determining whether an Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period is appropriate, or whether such period should be truncated, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during such period. The Exchange may also commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period if the Exchange believes, in the Exchange's sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors.

In determining whether an Additional Clawback Requirement Delinquency Cure Period after the expiration of the Initial Clawback Requirement Delinquency Cure Period is appropriate, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during the Additional Clawback Requirement Delinquency Cure Period. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is appropriate and the listed issuer fails to cure its Clawback Requirement Delinquency by the end of that period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Rule 5.5-E(a). In no event will the Exchange continue to trade a listed issuer's securities if that listed issuer has failed to cure its Clawback Requirement Delinquency on the date that is twelve months after the date of sending of the Clawback Requirement Delinquency Notification.

**Clarification of Rule 5.3-E**

The Exchange proposes to amend the text of Rule 5.3-E to make it clear, consistent with the language of proposed Rule 5.3-E(p), that every listed issuer would be subject to proposed Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule.

**2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>16</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that proposed new Rule 5.3-E(p) is consistent with the protection of investors and the public interest because it furthers the goal of ensuring the accuracy of the financial disclosure of listed issuers. Specifically, the Exchange believes the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which we expect will further discourage such behavior. The Exchange believes that these increased incentives may improve the overall quality and reliability of financial reporting, which further benefits investors. The new proposed Rule 5.3-E(p) is also consistent with the requirements of

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<sup>15</sup> 15 U.S.C. 78f(b).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

Section 10D of the Act and Rule 10D-1 thereunder, as it would establish a listing standard that is consistent with the requirements of Rule 10D-1.

Proposed Rule 5.3-E(p) would take effect on October 2, 2023 (the “Effective Date”).

The Exchange believes that it is consistent with Section 10D of the Act to delay effectiveness of Rule 5.3-E(p) until this date because it believes that doing so is consistent with the goal of implementing the proposed rule promptly while also being consistent with the expectations of listed issuers that the proposed rules would take effect a year after the adoption of SEC Rule 10D-1, based on the issuers’ understanding of a statement made by the SEC staff in the Rule 10D-1 Adopting Release.<sup>17</sup>

The Exchange proposes to adopt continued listing standards for proposed Rule 5.3-E(p) in proposed Rule 5.3-E(p)(F) that sets forth procedures that would apply if an issuer failed to comply with Rule 5.3-E(p). Proposed Rule 5.3-E(p)(F)(i) would provide compliance periods of up to 12 months for a listed issuer that is noncompliant with any aspect of Rule 5.3-E(p). The compliance process in proposed Rule 5.3-E(p)(F) is closely modeled on the compliance process for listed issuers delayed in submitting periodic reports to the SEC as set forth in Section 802.01E of the NYSE Listed Company Manual and Section 1007 of the NYSE American Company Guide. The Exchange believes that the compliance procedures set forth in proposed Rule 5.3-E(p)(F) are appropriately rigorous and are consistent with the public interest and the interests of investors.

The Exchange proposes to amend the text of Rule 5.3-E to make it clear, consistent with the language of proposed 5.3-E(p), that all listed issuers would be required to comply with the requirements of proposed 5.3-E(p) unless such issuer is eligible for an exemption set forth in that

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<sup>17</sup> See note 10 supra.

rule. The Exchange believes that this proposed amendment is consistent with the public interest and the interests of investors as it provides clarification by conforming the text of Rule 5.3-E to the requirements of proposed Rule 5.3-E(p).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that Rule 10D-1 under the Act requires all listing exchanges to adopt rules with respect to the recovery of erroneously awarded compensation that are substantively identically to proposed Rule 5.3-E(p).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2023-20 on the subject line.

Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2023-20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2023-20 and should be submitted on

or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

J. Matthew DeLesDernier,  
Deputy Secretary.

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<sup>18</sup> 17 CFR 200.30-3(a)(12).

Added text underlined;  
 Deleted text in [brackets]  
 Amendment 1 added text ***bold italic underlined***  
 Amendment 1 deleted text in ~~strikethrough~~

## RULES OF NYSE ARCA, INC.

\* \* \* \* \*

### Rule 5.3-E. Corporate Governance and Disclosure Policies

The Exchange shall require that specific corporate governance and disclosure policies be established by domestic issuers of any equity security listed pursuant to Rule 5.2-E. Issuers of any security that is listed pursuant to the Rules of the Exchange must comply with all of the provisions of Rule 5.3-E.

Notwithstanding the foregoing, registered management investment companies, preferred and debt listings, passive business organizations (such as royalty trusts), and derivative and special purpose securities (as defined below) shall only be required to comply with the provisions of Rule 5.3-E as described below:

- Registered management investment companies (except for derivative and special purpose securities which are subject to the requirements set forth below) shall only be required to comply with the provisions of Rules 5.3-E(a), 5.3-E(c) - 5.3-E(i)(4), 5.3-E(k) (except for 5.3-E(k)(2)-(4) and 5.3-E(k)(6)), 5.3-E(m) and 5.3-E(o).
- Preferred and debt listings, passive business organizations (such as royalty trusts), and derivative and special purpose securities (as defined below) shall only be required to comply with the provisions of Rules 5.3-E(a), 5.3-E(c), 5.3-E(e)(2), 5.3-E(d), 5.3-E(f)—5.3-E(i)(4), 5.3-E(k)(1), 5.3-E(o) and all applicable provisions of Rule 10A-3 of the Securities and Exchange Act of 1934. Notwithstanding the foregoing, (i) if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent, and (ii) issuers of Unit Investment Trusts (Rule 5.2-E(h)), Investment Company Units (5.2-E(j)(3)), Exchange-Traded Fund Shares (5.2-E(j)(8)), Portfolio Depository Receipts (8.100-E), Managed Fund Shares (8.600-E), Active Proxy Portfolio Shares (8.601-E) and Managed Portfolio Shares (8.900-E) shall not be required to comply with Rule 5.3-E(d)(9) in connection with the acquisition of the stock or assets of an affiliated registered investment company in a transaction that complies with Rule 17a-8 under the Investment Company Act of 1940 and does not otherwise require shareholder approval under the Investment Company Act of 1940 Act and the rules thereunder or any other Exchange rule.

- Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under the Act, are required to comply with all provisions of Rule 5.3 applicable to domestic issuers.

Notwithstanding the foregoing, every listed issuer is subject to Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule.

\* \* \* \* \*

Rule 5.3-E(p).

**Erroneously Awarded Compensation**

(A) This Rule 5.3-E(p) prohibits the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion hereof.

**(B) Implementation.**

(i) The effective date (“Effective Date”) of this Rule 5.3-E(p) is ~~{insert date of Commission approval of rule filing SR-NYSEArea-2023-20}~~ **October 2, 2023.**

(ii) Each listed issuer must adopt the recovery policy required by this Rule 5.3-E(p) (“Recovery Policy”) no later than 60 days following the Effective Date.

(iii) Each listed issuer must comply with its Recovery Policy for all incentive-based compensation Received (as such term is defined in Rule 5.3-E(p)(E) below) by executive officers on or after the Effective Date;

(iv) Each listed issuer must provide the required disclosures in the applicable SEC filings required on or after the Effective Date.

**(C) Requirements.**

The requirements of this Rule 5.3-E(p) are as follows:

**(1) Recovery of Erroneously Awarded Compensation.** The issuer must adopt and comply with a written Recovery Policy providing that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

(i) The issuer’s Recovery Policy must apply to all incentive-based compensation received by a person:

(a) After beginning service as an executive officer;

(b) Who served as an executive officer at any time during the performance period for that incentive-based compensation;

(c) While the issuer has a class of securities listed on a national securities exchange or a national securities association; and

(d) During the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p). In addition to these last three completed fiscal years, the recovery policy must apply to any transition period (that results from a change in the issuer's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the issuer's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year. An issuer's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.

(ii) For purposes of determining the relevant recovery period, the date that an issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p) is the earlier to occur of:

(a) The date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p);  
or

(b) The date a court, regulator, or other legally authorized body directs the issuer to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p).

(iii) The amount of incentive-based compensation that must be subject to the issuer's recovery policy ("erroneously awarded compensation") is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:

(a) The amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received; and

(b) The issuer must maintain documentation of the determination of that reasonable estimate and provide such documentation to the Exchange.

(iv) The issuer must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that the conditions of paragraphs (C)(1)(iv)(a), (b), or (c) of this Rule 5.3-E(p) are met, and the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable.

(a) The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the issuer must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the Exchange.

(b) Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, acceptable to the Exchange, that recovery would result in such a violation, and must provide such opinion to the Exchange.

(c) Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.

(v) The issuer is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.

(2) The issuer must file all disclosures with respect to such Recovery Policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the applicable Commission filings

#### **(D) General Exemptions**

The requirements of this Rule 5.3-E(p) do not apply to the listing of:

(1) A security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A));

(2) A standardized option, as defined in 17 CFR 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1);

(3) Any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); (4) Any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is

registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

**(E) Definitions.** Unless the context otherwise requires, the following definitions apply for purposes of this Rule 5.3-E(p):

Executive Officer. An executive officer is the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parent(s) or subsidiaries are deemed executive officers of the issuer if they perform such policy making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant. Identification of an executive officer for purposes of this Rule 5.3-E(p) would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b).

Financial reporting measures. Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.

Incentive-based compensation. Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.

Received. Incentive-based compensation is deemed received in the issuer's fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

(F) Noncompliance with Rule 5.3-E(p) (Erroneously Awarded Compensation).

(i) Recovery of Erroneously Awarded Compensation.

~~Trading in all listed securities of any listed issuer that the Exchange determines is non-compliant with any of the provisions of Rule 5.3 E(p) (Erroneously Awarded Compensation) (except for a delayed adoption of a Recovery Policy, which is subject to Rule 5.3 E(p)(F)(ii)) will be immediately suspended and the Exchange will immediately commence delisting procedures with respect to all such listed securities. A listed issuer will be subject to the procedures outlined in Rule 5.5 E(a) with respect to such a delisting determination.~~

~~(ii) Delayed Adoption of Recovery Policy~~

~~A listed issuer will be deemed to be below standards in the event of any failure by such listed issuer to adopt its required Recovery Policy no later than 60 days following the Effective Date (a “Late Recovery Policy Adoption Delinquency”). The listed issuer would be required to notify the Exchange in writing within five days of the Effective Date if it fails to adopt its Recovery Policy by that date.~~

~~Upon the occurrence of a Late Recovery Policy Adoption Delinquency, the Exchange will promptly send written notification (the “Late Recovery Policy Adoption Delinquency Notification”) to a listed issuer of the procedures set forth below. Within five days of the date of the Late Recovery Policy Adoption Delinquency Notification, the listed issuer will be required to (A) contact the Exchange to discuss the status of the delayed Recovery Policy and (B) issue a press release disclosing the occurrence of the Late Recovery Policy Adoption Delinquency, the reason for the Late Recovery Policy Adoption Delinquency and, if known, the anticipated date such Late Recovery Policy Adoption Delinquency will be cured. If the listed issuer has not issued the required press release within five days of the date of the Late Recovery Policy Adoption Delinquency Notification, the Exchange will issue a press release stating that the issuer has incurred a Late Recovery Policy Adoption Delinquency.~~

~~During the six month period from the date of the Late Recovery Policy Adoption Delinquency (the “Initial Late Recovery Policy Adoption Cure Period”), the Exchange will monitor the listed issuer and the status of the delayed Recovery Policy, including through contact with the company, until the Late Recovery Policy Adoption Delinquency is cured. If the listed issuer fails to cure the Late Recovery Policy Adoption Delinquency within the Initial Late Recovery Policy Adoption Cure Period, the Exchange may, in the Exchange’s sole discretion, allow the company’s securities to be traded for up to an additional six month period (the “Additional Late Recovery Policy Adoption Cure Period”) depending on the company’s specific circumstances. If the Exchange determines that an Additional Late Recovery Policy Adoption Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Rule 5.5 E(a). Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a listed issuer any Initial Late Recovery Policy Adoption Cure Period or Additional Late Recovery Policy Adoption Cure Period, as the case may be, at all or (ii) at any time during the Initial Late Recovery Policy Adoption Cure Period or Additional Late Recovery Policy Adoption Cure Period, to truncate the Initial Cure Period or Additional Cure Period, as the case may be, and immediately commence suspension and delisting procedures if the listed issuer is subject to delisting pursuant to any other Exchange rule, including if the Exchange believes, in the Exchange’s sole discretion, that continued listing~~

~~and trading of a company's securities on the Exchange is inadvisable or unwarranted. The Exchange may also commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Late Recovery Policy Adoption Cure Period or Additional Late Recovery Policy Adoption Cure Period if the Exchange believes, in the Exchange's sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors.~~

~~In determining whether an Additional Late Recovery Policy Adoption Cure Period after the expiration of the Initial Late Recovery Policy Adoption Cure Period is appropriate, the Exchange will consider the likelihood that the delayed Recovery Policy can be adopted during the Additional Late Recovery Policy Adoption Cure Period. If the Exchange determines that an Additional Late Recovery Policy Adoption Cure Period is appropriate and the listed issuer fails to adopt a Recovery Policy by the end of such Additional Late Recovery Policy Adoption Cure Period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Rule 5.5 E(a). In no event will the Exchange continue to trade a company's securities if that listed issuer has failed to cure its Late Recovery Policy Adoption Delinquency on the date that is twelve months after the commencement of the company's Late Recovery Policy Adoption Delinquency.~~

**(i) Suspension of Trading in the Event of Noncompliance with Rule 5.3-E(p)**

**In the event that the Exchange determines that a listed issuer is non-compliant with any of the provisions of Rule 5.3-E(p) (Erroneously Awarded Compensation) and such listed issuer does not regain compliance with such provision within any compliance period provided by the Exchange under Rules 5.3-E(p)(iii) and (iv) below, all the listed securities of such issuer will be immediately suspended and the Exchange will immediately commence delisting procedures with respect to all such listed securities. A listed issuer will be subject to the procedures outlined in Rule 5-5E(a) with respect to such a delisting determination.**

**(ii) Events of Noncompliance with Rule 5.3-E(p)**

**A listed issuer will be deemed to be below standards in the event of any failure by such listed issuer to comply with any requirement of Rule 5.3-E(p) (a "Clawback Requirement Delinquency"). The listed issuer would be required to notify the Exchange in writing within five days of any type of Clawback Requirement Delinquency.**

**When the Exchange determines that a Clawback Requirement Delinquency has occurred, the Exchange will promptly send written notification (the "Clawback Requirement Delinquency Notification") to a listed issuer of the procedures set forth below. Within five days of the date of receipt of a Clawback Requirement Delinquency Notification, the listed issuer will be required to (a) contact the Exchange to discuss the status of resolution of the Clawback Requirement Delinquency and (b) issue a press release disclosing the occurrence of the Clawback Requirement Delinquency, the reason for the Clawback Requirement Delinquency and, if known, the anticipated date the Clawback Requirement Delinquency will be cured. If the listed issuer has not issued the required press release within five days of the date of the Clawback Requirement Delinquency Notification, the Exchange will issue a press release**

stating that the issuer has incurred a Clawback Requirement Delinquency and providing a description thereof.

(iii) Cure Periods for Events of Noncompliance with Rule 5.3-E(p)

During the six-month period from the date of the Clawback Requirement Delinquency (the “Initial Clawback Requirement Delinquency Cure Period”), the Exchange will monitor the listed issuer and the status of resolution of the Clawback Requirement Delinquency, including through contact with the listed issuer, until the Clawback Requirement Delinquency is cured. If the listed issuer fails to cure the Clawback Requirement Delinquency within the Initial Clawback Requirement Delinquency Cure Period, the Exchange may, in its sole discretion, allow the listed issuer’s securities to be traded for up to an additional six-month period (the “Additional Clawback Requirement Delinquency Cure Period”) depending on the listed issuer’s specific circumstances and as described below. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Rule 5.5-E(a). Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a listed issuer any Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, as the case may be, at all, or (ii) at any time during the Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, to truncate the cure period and immediately commence suspension and delisting procedures if the listed issuer is subject to delisting pursuant to any other provision of the rules, including if the Exchange believes, in the Exchange’s sole discretion, that continued listing and trading of a listed issuer’s securities on the Exchange is inadvisable or unwarranted. In determining whether an Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period is appropriate, or whether such period should be truncated, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during such period. The Exchange may also commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period if the Exchange believes, in the Exchange’s sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors.

(iv) Additional Cure Period for Events of Noncompliance with Rule 5.3-E(p)

In determining whether an Additional Clawback Requirement Delinquency Cure Period after the expiration of the Initial Clawback Requirement Delinquency Cure Period is appropriate, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during the Additional Clawback Requirement Delinquency Cure Period. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is appropriate and the listed issuer fails to cure its Clawback Requirement Delinquency by the end of that period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Rule 5.5-E(a). In no event will the Exchange continue to trade a listed issuer’s securities if that listed issuer has failed to cure its Clawback

**Requirement Delinquency on the date that is twelve months after the date of sending of the Clawback Requirement Delinquency Notification.**

Rule 5.4-E(a). Suspension/Public Reprimand

\* \* \* \* \*

Additions underlined  
Deletions [bracketed]

## RULES OF NYSE ARCA, INC.

\* \* \* \* \*

### Rule 5.3-E. Corporate Governance and Disclosure Policies

The Exchange shall require that specific corporate governance and disclosure policies be established by domestic issuers of any equity security listed pursuant to Rule 5.2-E. Issuers of any security that is listed pursuant to the Rules of the Exchange must comply with all of the provisions of Rule 5.3-E.

Notwithstanding the foregoing, registered management investment companies, preferred and debt listings, passive business organizations (such as royalty trusts), and derivative and special purpose securities (as defined below) shall only be required to comply with the provisions of Rule 5.3-E as described below:

- Registered management investment companies (except for derivative and special purpose securities which are subject to the requirements set forth below) shall only be required to comply with the provisions of Rules 5.3-E(a), 5.3-E(c) - 5.3-E(i)(4), 5.3-E(k) (except for 5.3-E(k)(2)-(4) and 5.3-E(k)(6)), 5.3-E(m) and 5.3-E(o).
- Preferred and debt listings, passive business organizations (such as royalty trusts), and derivative and special purpose securities (as defined below) shall only be required to comply with the provisions of Rules 5.3-E(a), 5.3-E(c), 5.3-E(e)(2), 5.3-E(d), 5.3-E(f)—5.3-E(i)(4), 5.3-E(k)(1), 5.3-E(o) and all applicable provisions of Rule 10A-3 of the Securities and Exchange Act of 1934. Notwithstanding the foregoing, (i) if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent, and (ii) issuers of Unit Investment Trusts (Rule 5.2-E(h)), Investment Company Units (5.2-E(j)(3)), Exchange-Traded Fund Shares (5.2-E(j)(8)), Portfolio Depositary Receipts (8.100-E), Managed Fund Shares (8.600-E), Active Proxy Portfolio Shares (8.601-E) and Managed Portfolio Shares (8.900-E) shall not be required to comply with Rule 5.3-E(d)(9) in connection with the acquisition of the stock or assets of an affiliated registered investment company in a transaction that complies with Rule 17a-8 under the Investment Company Act of 1940 and does not otherwise require shareholder approval under the Investment Company Act of 1940 Act and the rules thereunder or any other Exchange rule.

- Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under the Act, are required to comply with all provisions of Rule 5.3 applicable to domestic issuers.

Notwithstanding the foregoing, every listed issuer is subject to Rule 5.3-E(p) unless such issuer is eligible for an exemption set forth in that rule.

\* \* \* \* \*

Rule 5.3-E(p).

### **Erroneously Awarded Compensation**

(A) This Rule 5.3-E(p) prohibits the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion hereof.

#### **(B) Implementation.**

(i) The effective date (“Effective Date”) of this Rule 5.3-E(p) is October 2, 2023.

(ii) Each listed issuer must adopt the recovery policy required by this Rule 5.3-E(p) (“Recovery Policy”) no later than 60 days following the Effective Date.

(iii) Each listed issuer must comply with its Recovery Policy for all incentive-based compensation Received (as such term is defined in Rule 5.3-E(p)(E) below) by executive officers on or after the Effective Date;

(iv) Each listed issuer must provide the required disclosures in the applicable SEC filings required on or after the Effective Date.

#### **(C) Requirements.**

The requirements of this Rule 5.3-E(p) are as follows:

**(1) Recovery of Erroneously Awarded Compensation.** The issuer must adopt and comply with a written Recovery Policy providing that the issuer will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.

(i) The issuer’s Recovery Policy must apply to all incentive-based compensation received by a person:

(a) After beginning service as an executive officer;

(b) Who served as an executive officer at any time during the performance period for that incentive-based compensation;

(c) While the issuer has a class of securities listed on a national securities exchange or a national securities association; and

(d) During the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p). In addition to these last three completed fiscal years, the recovery policy must apply to any transition period (that results from a change in the issuer's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the issuer's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year. An issuer's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.

(ii) For purposes of determining the relevant recovery period, the date that an issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p) is the earlier to occur of:

(a) The date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the issuer is required to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p);  
or

(b) The date a court, regulator, or other legally authorized body directs the issuer to prepare an accounting restatement as described in paragraph (C)(1) of this Rule 5.3-E(p).

(iii) The amount of incentive-based compensation that must be subject to the issuer's recovery policy ("erroneously awarded compensation") is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:

(a) The amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received; and

(b) The issuer must maintain documentation of the determination of that reasonable estimate and provide such documentation to the Exchange.

(iv) The issuer must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that the conditions of paragraphs (C)(1)(iv)(a), (b), or (c) of this Rule 5.3-E(p) are met, and the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable.

(a) The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the issuer must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the Exchange.

(b) Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, acceptable to the Exchange, that recovery would result in such a violation, and must provide such opinion to the Exchange.

(c) Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.

(v) The issuer is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.

(2) The issuer must file all disclosures with respect to such Recovery Policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the applicable Commission filings

#### **(D) General Exemptions**

The requirements of this Rule 5.3-E(p) do not apply to the listing of:

(1) A security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A));

(2) A standardized option, as defined in 17 CFR 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1);

(3) Any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2); (4) Any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if

such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

**(E) Definitions.** Unless the context otherwise requires, the following definitions apply for purposes of this Rule 5.3-E(p):

*Executive Officer.* An executive officer is the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parent(s) or subsidiaries are deemed executive officers of the issuer if they perform such policy making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant. Identification of an executive officer for purposes of this Rule 5.3-E(p) would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b).

*Financial reporting measures.* Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.

*Incentive-based compensation.* Incentive-based compensation is any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.

*Received.* Incentive-based compensation is deemed received in the issuer's fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

**(F) Noncompliance with Rule 5.3-E(p) (Erroneously Awarded Compensation).**

(i) Suspension of Trading in the Event of Noncompliance with Rule 5.3-E(p)

In the event that the Exchange determines that a listed issuer is non-compliant with any of the provisions of Rule 5.3-E(p) (Erroneously Awarded Compensation) and such listed issuer does not regain compliance with such provision within any compliance period provided by the

Exchange under Rules 5.3-E(p)(iii) and (iv) below, all the listed securities of such issuer will be immediately suspended and the Exchange will immediately commence delisting procedures with respect to all such listed securities. A listed issuer will be subject to the procedures outlined in Rule 5-5E(a) with respect to such a delisting determination.

(ii) Events of Noncompliance with Rule 5.3-E(p)

A listed issuer will be deemed to be below standards in the event of any failure by such listed issuer to comply with any requirement of Rule 5.3-E(p) (a “Clawback Requirement Delinquency”). The listed issuer would be required to notify the Exchange in writing within five days of any type of Clawback Requirement Delinquency.

When the Exchange determines that a Clawback Requirement Delinquency has occurred, the Exchange will promptly send written notification (the “Clawback Requirement Delinquency Notification”) to a listed issuer of the procedures set forth below. Within five days of the date of receipt of a Clawback Requirement Delinquency Notification, the listed issuer will be required to (a) contact the Exchange to discuss the status of resolution of the Clawback Requirement Delinquency and (b) issue a press release disclosing the occurrence of the Clawback Requirement Delinquency, the reason for the Clawback Requirement Delinquency and, if known, the anticipated date the Clawback Requirement Delinquency will be cured. If the listed issuer has not issued the required press release within five days of the date of the Clawback Requirement Delinquency Notification, the Exchange will issue a press release stating that the issuer has incurred a Clawback Requirement Delinquency and providing a description thereof.

(iii) Cure Periods for Events of Noncompliance with Rule 5.3-E(p)

During the six-month period from the date of the Clawback Requirement Delinquency (the “Initial Clawback Requirement Delinquency Cure Period”), the Exchange will monitor the listed issuer and the status of resolution of the Clawback Requirement Delinquency, including through contact with the listed issuer, until the Clawback Requirement Delinquency is cured. If the listed issuer fails to cure the Clawback Requirement Delinquency within the Initial Clawback Requirement Delinquency Cure Period, the Exchange may, in its sole discretion, allow the listed issuer’s securities to be traded for up to an additional six-month period (the “Additional Clawback Requirement Delinquency Cure Period”) depending on the listed issuer’s specific circumstances and as described below. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Rule 5.5-E(a). Notwithstanding the foregoing, however, the Exchange may in its sole discretion decide (i) not to afford a listed issuer any Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, as the case may be, at all, or (ii) at any time during the Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period, to truncate the cure period and immediately commence suspension and delisting procedures if the listed issuer is subject to delisting pursuant to any other provision of the rules, including if the Exchange believes, in the Exchange’s sole discretion, that continued listing and trading of a listed issuer’s securities on the Exchange is inadvisable or unwarranted. In determining whether an Initial Clawback Requirement Delinquency Cure Period or Additional

Clawback Requirement Delinquency Cure Period is appropriate, or whether such period should be truncated, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during such period. The Exchange may also commence suspension and delisting procedures without affording any cure period at all or at any time during the Initial Clawback Requirement Delinquency Cure Period or Additional Clawback Requirement Delinquency Cure Period if the Exchange believes, in the Exchange's sole discretion, that it is advisable to do so on the basis of an analysis of all relevant factors.

(iv) Additional Cure Period for Events of Noncompliance with Rule 5.3-E(p)

In determining whether an Additional Clawback Requirement Delinquency Cure Period after the expiration of the Initial Clawback Requirement Delinquency Cure Period is appropriate, the Exchange will consider the likelihood that the Clawback Requirement Delinquency can be cured during the Additional Clawback Requirement Delinquency Cure Period. If the Exchange determines that an Additional Clawback Requirement Delinquency Cure Period is appropriate and the listed issuer fails to cure its Clawback Requirement Delinquency by the end of that period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Rule 5.5-E(a). In no event will the Exchange continue to trade a listed issuer's securities if that listed issuer has failed to cure its Clawback Requirement Delinquency on the date that is twelve months after the date of sending of the Clawback Requirement Delinquency Notification.

Rule 5.4-E(a). Suspension/Public Reprimand

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